

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
BANKRUPTCY DIVISION**

In re:

Chapter 11

**INNOVATIVE COMMUNICATION
COMPANY, LLC,**

**Case No. 06-30008 (JKF)
Jointly Administered**

Debtor.

Related to Dkt. No. 738

Hearing: Emergency Setting Requested

**CHAPTER 11 TRUSTEE'S EMERGENCY MOTION FOR
ORDER TO SHOW CAUSE WHY THE PUBLIC SERVICE COMMISSION'S
HEARING EXAMINER SHOULD NOT BE HELD IN CONTEMPT**

(EMERGENCY HEARING REQUESTED)

Stan Springel, Court-appointed chapter 11 trustee (the "Trustee") for Emerging Communications, Inc. ("ECI") and Innovative Communication Company, LLC ("ICC-LLC," and together with ECI, the "Debtors"), through undersigned counsel, hereby submits this Emergency Motion seeking an Order to Show Cause (the "Emergency Motion") why Jeffrey B.C. Moorhead ("Moorhead" or the "Hearing Examiner"), in his capacity as Hearing Examiner in the Change of Control Proceeding for Innovative Telephone Company (the "Proceeding"), currently pending before the Public Services Commission (the "PSC"), PSC Docket No. 571, should not be held in contempt of this Bankruptcy Court's September 7, 2007 Order Approving Trustee's Use of Property of the Emerging Communications, Inc. Estate Outside the Ordinary Course of Business (DE 870, the "New ICC Order"), and states the following:

I. LOCAL RULE 9013-2 CERTIFICATION OF EXIGENCY

1. The Trustee seeks expedited relief in connection with this Emergency Motion for cause, prompted by the Hearing Examiner's issuance of an *ex parte* order on September 11, 2007 (the "September 11 Order") in the Proceeding, without authority or justification, which order

undermines the jurisdiction of this Bankruptcy Court (the “Bankruptcy Court”), interferes with the administration of these bankruptcy estates, and constitutes a blatant misuse of office by an agent of the PSC, in contravention of the statutory limitations placed upon him and the governmental agency on whose behalf he purports to act. The September 11 Order is obviously in response to, and is a direct contradiction of, the mandate of this Bankruptcy Court enunciated in the New ICC Order, which authorizes the Trustee to vote all shares of common stock in New ICC owned by ECI. As counsel of record for the PSC and as an officer of this Bankruptcy Court, Moorhead was well aware of the PSC’s right to appeal the New ICC Order and to seek a stay of its effectiveness from this Bankruptcy Court (and, if denied, from the District Court), pending the appeal.¹ Moorhead made no attempt to seek a stay of the New ICC Order, but instead issued his *ex parte* September 11 Order in an effort to thwart the relief ordered by this Bankruptcy Court in the New ICC Order. Predictably, management of New ICC has improperly utilized the September 11 Order to continue to impede the Trustee’s access to New ICC’s assets, including without limitation, its books and records and financial information. In the meantime, Jeffrey Prosser (“Prosser”) and his management team remain in control of New ICC and its operating subsidiaries. In the absence of emergency relief, the Trustee is concerned that assets of New ICC may be intentionally or inadvertently lost, destroyed, absconded with, and/or removed from New ICC’s premises in Florida, St. Croix, and other venues.

¹ Indeed, Moorhead filed an Appeal of the Appointment Order (as hereinafter defined) on behalf of the PSC, which he later abandoned.

II. JURISDICTION AND VENUE

2. This Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. BACKGROUND FACTS

3. On March 17, 1997, Prosser incorporated ECI under the laws of the State of Delaware.

4. On June 26, 1997, Prosser incorporated Innovative Communication Corporation (“New ICC”) under the laws of the United States Virgin Islands as a wholly-owned subsidiary of ECI. Among ECI’s principal assets is its ownership interest in 100% of the common shares of New ICC.

5. New ICC owns, among other things, 100% of the shares of Virgin Islands Telephone Co. d/b/a Innovative Telephone (“Vitelco”), which provides telecommunications services in the USVI.

6. On July 31, 2006 (the “Voluntary Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”) before this Bankruptcy Court. The cases are being jointly administered.

7. On November 2, 2006, three months after the Voluntary Petition Date, the Legislature of the USVI (the “Legislature”) held a public meeting to discuss with the PSC and its legal counsel, Moorhead, the impact of the bankruptcy proceedings upon Vitelco. Copies of the relevant pages of the transcript of the November 2 session are attached hereto as Exhibit “A.”

8. Among other things, the Legislature questioned Moorhead at the November 2 session regarding this Bankruptcy Court's ability to supersede the PSC's regulatory authority. Specifically, Senator Usie R. Richards asked Moorhead to explain the PSC's position "on this Bankruptcy Court issue." *See* Exh. A, p. 71, l. 4-6. Moorhead responded that "[f]ederal law supersedes anything this body does, senator . . . If this Bankruptcy Court appoints a Trustee, that Trustee, with the approval of this Bankruptcy Court can do anything it wishes." *See id.*, p. 71, l. 7-14. Moorhead also stated that "[t]hey don't even have to come to the Public Service Commission to ask for permission to do anything. Because Federal law supersedes anything this body passes." *See id.*, at p. 71, l. 15-18.

9. Shortly thereafter, on December 19, 2006, the Office of the United States Trustee filed its *Motion to Appoint a Chapter 11 Trustee* to operate the Debtor's businesses pursuant to § 1106 of the Bankruptcy Code (DE 199, the "Trustee Motion").

10. Moorhead subsequently filed an Objection to the Trustee Motion (DE 282, the "PSC Objection"). In the PSC Objection, Moorhead argued that the appointment of a trustee as requested by the United States government would violate § 43a of Title Thirty of the Virgin Islands Code ("Title 30") by effecting an indirect change of control of a regulated utility without prior PSC approval.

11. On January 19, 2007, this Bankruptcy Court held a hearing on the Trustee Motion. Copies of the relevant pages of the transcript of the January 19 hearing are attached hereto as Exhibit "B." Moorhead appeared as counsel for the PSC at the January 19, 2007 hearing. *See* Exh. B, p. 13, lines 13-18.

12. On January 24, 2007, this Bankruptcy Court held a continued hearing on the Trustee Motion. Copies of the relevant pages of the transcript of the January 24 hearing are

attached hereto as Exhibit “C.” Moorhead again appeared as counsel for the PSC at the January 24, 2007 hearing. *See* Exh. C, p. 6, line 24 through p. 7, line 14. Moorhead also presented arguments in opposition to the Trustee Motion on behalf of the PSC at the January 24, 2007 hearing. *See id.*, p. 139, line 10 through p. 149, line 4. Among other things, Moorhead argued that if this Bankruptcy Court granted the Trustee Motion and appointed the Trustee, such appointment would constitute a change of control under § 43a of Title 30. *See id.*

13. On February 13, 2007, this Bankruptcy Court entered a Memorandum Opinion articulating the basis for its appointment of a Chapter 11 trustee and specifically rejecting the PSC’s arguments articulated in the PSC Objection.

14. On February 26, 2007, the PSC held a closed-door meeting in the United States Virgin Islands to discuss the Memorandum Opinion. Moorhead, purported counsel for the PSC, also served as the hearing officer during the February 26 meeting.²

15. On the same day, February 26, 2007, Commission Chairperson Wells (“Chairperson Wells”) entered PSC Order 13/2007, by which Moorhead and the PSC rejected this Bankruptcy Court’s reasoning in the Memorandum Opinion. A copy of Order 13/2007 is attached hereto as Exhibit “D.”

² The Trustee asserts that Moorhead, as a private attorney not employed by the Attorney General of the USVI, cannot serve as counsel for the PSC as a matter of law. The Virgin Islands Code forbids the PSC from retaining private counsel to provide legal advice or to otherwise represent the PSC’s interest in any civil matter. *See Virgin Islands Daily News v. Government of the Virgin Islands*, 2005 WL 3663481, *3 (V.I. Terr., Dec. 19, 2005); *Virgin Islands Daily News v. Government of the Virgin Islands*, 2002 WL 31956031 (V.I. Terr., Dec. 19, 2002). “[I]n regards to civil court proceedings, local statutory law mandates that the PSC must be represented by the Attorney General’s Office.” *Virgin Islands Daily News*, 2005 WL 3663481, *3.

Additionally, Moorhead cannot act as both counsel for the PSC in the ICC bankruptcy case and as hearing examiner in the Proceeding. A hearing examiner does not merely prosecute the PSC’s allegations, but must investigate impartially and without bias. *See Virgin Islands Water and Power Authority v. Public Services Commission*, 2002 WL 31309607, *5 (V.I. Terr., Sept. 24, 2002). The hearing examiner, as an appointee of the PSC, must be presumed to have substantial influence over the PSC’s eventual findings, and therefore must be more than an advocate for the PSC’s positions. *See id.* The hearing examiner must act as an impartial factfinder. *See id.*

16. Order 13/2007 was entered by the PSC despite Moorhead's statements during the November 2, 2006 legislative session concerning the supremacy of federal bankruptcy law over any edicts, adjudications or orders entered by the PSC. Specifically, Order 13/2007 concludes that the appointment of a trustee for the Debtors by this Bankruptcy Court "is a clear transfer of control that Section 43a declares to be void if not first approved by the Commission."

17. Significantly, Order 13/2007 does not find any adverse effects of the Trustee's appointment on the quality of service by any public utility were imminent. More importantly, there was no public hearing conducted before the entry of this *ex parte* order, in violation of § 4 of Title 30.

18. Nevertheless, through Order 13/2007, the PSC mandates that "no trustee shall begin work pursuant to any court appointment, nor should any other indirect transfer of control take place for that matter, except after filing an application for transfer of control with this Commission and receiving approval for the same."

19. On March 1, 2007, Chairperson Wells entered PSC Order 14/2007 in the Proceeding, appointing Moorhead as Hearing Examiner, and Gregory Mann, Ph.D. ("Mann") as Technical Advisor to the PSC. A copy of Order 14/2007 is attached hereto as Exhibit "E." Order 14/2007 also notes the appointment of Messrs. Moorhead and Mann as the PSC's representatives before this Bankruptcy Court "in pending litigation involving various corporate entities owned and/or controlled by Mr. Jeffrey Prosser, these include, but are not limited to, ICC-LLC and EmCom."

20. On March 2, 2007, Moorhead filed before this Bankruptcy Court an Opposition to the Trustee Application (DE 492, the "Trustee Opposition"). In the Trustee Opposition, Moorhead states that the Commissioners "[oppose] the actions of the Office of the United States

Trustee and its decision to appoint Stan Springel U.S. [sic] Trustee for the corporate debtors.” Moorhead signed the Trustee Opposition as “attorney” for the PSC.

21. On March 15, 2007, this Bankruptcy Court entered an Order approving the appointment of Stan Springel as Trustee (DE 523, the “Appointment Order”). In the Appointment Order, this Bankruptcy Court directs the Trustee to “perform all duties under 11 U.S.C. § 1106 and in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, applicable Local Rules, and orders of this Bankruptcy Court.” This Bankruptcy Court further directs the Trustee to “take cognizance of and comply with the regulatory authority of the Public Services Commission . . . insofar as it is applicable to the nondebtor utility(ies),” including, without limitation, Vitelco.

22. This Bankruptcy Court additionally directed New ICC and Prosser to “cooperate with the Trustee” and “cause nondebtor entities whose influence in these cases is critical to the reorganization of these cases to cooperate with the Trustee as well.”

23. On March 26, 2007, Moorhead, strictly in his capacity as Hearing Examiner in the Proceeding, issued an *ex parte* Show Cause Order of the Hearing Examiner (the “Show Cause Order”) directed at the Trustee. A copy of the Show Cause Order is attached hereto as Exhibit “F.” In the Show Cause Order, Moorhead reiterates the PSC’s disagreement with this Bankruptcy Court regarding the interpretation and effect of § 43a. Moorhead then directs the Trustee “not to exercise any control over the management and operations of the public utilities,” and directs the “public utilities” not to permit the Trustee “to manage or operate the utilities in any manner.” Moorhead further directs the Trustee to respond to the Show Cause Order and “state why or why not the proposed legal conclusions, factual findings, and remedies” stated in the Show Cause Order “should not be entered on a more permanent basis.”

24. Thereafter, on March 28, 2007, the Trustee filed a Petition for Reconsideration of Order 13/2007 pursuant to 30 V.I.C. § 33 (the “Petition for Reconsideration”). The PSC failed to take any action on the Petition for Reconsideration within sixty days after its filing. Accordingly, the Petition for Reconsideration was deemed denied pursuant to 30 V.I.C. § 33.

25. On June 26, 2007, the Trustee filed a Petition for Appeal of Order 13/2007 (the “Appellate Petition”) before the Superior Court of the Virgin Islands, Division of St. Thomas and St. John (the “Superior Court”), initiating Case No. 322-2007 (the “Appeal”). By the Appeal, the Trustee requests that the Superior Court vacate Order 13/2007.

26. On July 6, 2007, the Trustee filed an Emergency Motion for Approval of Use of Property of the Emerging Communications, Inc. Estate Outside the Ordinary Course of Business (DE 738, the “New ICC Motion”). By the New ICC Motion, the Trustee sought this Bankruptcy Court’s approval “to vote ECI’s shares of stock in [New ICC] . . . to remove the current board of directors of New ICC and replace them with the Trustee, to take related corporate action to effectuate the Trustee’s control over New ICC in order to facilitate a transaction for the sale or refinancing of the Debtors and their ‘Operating Subsidiaries’ and, if necessary, to file a voluntary bankruptcy petition on behalf of New ICC.”

27. On July 27, 2007, Moorhead (as attorney for the PSC) filed an Opposition to the New ICC Motion (DE 778, the “PSC Opposition”). In the PSC Opposition, Moorhead argues that this Bankruptcy Court should deny the New ICC Motion because “[t]he Trustee has violated the Appointment Order by failing to comply with regulatory authority [*sic*] of the PSC . . . by failing to acknowledge the Commission’s authority and by filing a written request to use the property of the Emerging Communications [*sic*] in violation of Virgin Islands law.”

28. On September 7, 2007, after notice and an evidentiary hearing, this Bankruptcy Court entered the New ICC Order. In the New ICC Order, this Bankruptcy Court found that the relief requested in the New ICC Motion “is in the best interests of the Debtors, their estates, their creditors, and all other interested parties.” This Bankruptcy Court specifically overruled “any and all objections” to the New ICC Motion. This Bankruptcy Court finally retained jurisdiction “with respect to all matters arising from or related to the implementation or interpretation of this Order.” A copy of the New ICC Order is attached hereto as Exhibit “G.”

29. On September 11, 2007, Moorhead, as Hearing Examiner, entered the September 11 Order without prior notice to the Trustee or an opportunity to be heard. A copy of his September 11 Order is attached hereto as Exhibit “H.”

30. By the September 11 Order, Moorhead, acting completely outside the scope of his limited authority as hearing Examiner and in the absence of a hearing, seeks to undermine and effectively overturn the New ICC Order by directing “the parties not to effect or cooperate in any change in control of the Virgin Islands public utilities as mandated in the Show Cause Order.” September 11 Order, p. 4. Implicit in the September 11 Order is Moorhead’s unilateral legal conclusion that the New ICC Order constitutes a “change in control of the Virgin Islands public utilities.” However, New ICC is merely an unregulated holding company.

31. Without giving notice to the Trustee or other parties in interest or taking evidence, Moorhead concluded in the September 11 Order that “[t]he Trustee remains in breach of the statute’s expressed obligation to file an application for the transfer of control of the public utilities” and that the Trustee “is in clear violation of Virgin Islands law.” Then, in total disregard of this Bankruptcy Court’s New ICC Order, Moorhead orders what is, in effect, *ex parte* injunctive relief -- “it is incumbent upon the trustee that no further effort be made to

exercise any authority over the public utilities until such time as a properly executed transfer of control can be achieved.” The PSC itself, let alone Moorhead, lacks authority to issue such an order absent a hearing. *See* 30 V.I.C. § 4.

32. The September 11 Order is a blatant attempt by Moorhead to interfere with this Bankruptcy Court’s jurisdiction and undermine this Bankruptcy Court’s directives. Prosser and his management team have used this action to their own benefit by interpreting the September 11 Order to include New ICC. The fact that the September 11 Order prominently discusses the New ICC Order and was hurriedly entered just two business days later confirms that the specific purpose of the September 11 Order is to give the officers of New ICC a purportedly legitimate excuse not to comply with the New ICC Order.

33. The officers of New ICC have made the most of this excuse. New ICC employees, at the direction of Prosser and other officers of New ICC, have denied the Trustee’s professionals any reasonable access to the premises or to the books and records of New ICC, even after the entry of the New ICC Order. An affidavit of Byron Smyl (“Smyl”), an employee of the Trustee’s accountants, Alvarez & Marsal (“A&M”), which attests to these continuing obstructionary maneuvers, is attached hereto as Exhibit “I.”

34. Specifically, the officers of New ICC, including Prosser, and others under Prosser’s direction, have systematically and continually denied the Trustee and his professionals any direct, and therefore useful, access to the financial data and accounts of New ICC, and other selected USVI operating subsidiaries that the officers consider to be regulated by the PSC on the alleged grounds they do not want to violate the Show Cause Order and the September 11 Order (collectively, the “Moorhead Orders”). *See* Smyl Aff., ¶ 5.

35. As of the date of this Motion, the A&M team has received virtually no documents relating to New ICC, Vitelco or the other regulated USVI operating subsidiaries except for data that has been previously uploaded into an online data room and two documents with limited financial details provided by Rothschild. Nor has the A&M team had any opportunity to discuss these entities with any employees of New ICC or the regulated USVI operating subsidiaries. *See* Smyl Aff., ¶ 6.

36. On Monday, September 10, 2007, after being relegated to an ancillary business office for the prior week, Smyl finally gained access to New ICC's central corporate office in Christiansted, St. Croix, where the New ICC accounting staff is located. *See* Smyl Aff., ¶ 8. The next day, however, shortly after receipt of the September 11 Order and apparently upon Prosser's instructions, Bobby Lubana ("Lubana"), a New ICC officer, informed Smyl that the A&M team would not be provided access to the corporate office and would need to return to the ancillary offices. In addition, Lubana reiterated that A&M would not be provided access to any information related to New ICC, Vitelco, and the other regulated USVI operating subsidiaries until the resolution of the PSC matter per the September 11 Order. *See* Smyl Aff., ¶ 8.

37. The continuing efforts of officers of New ICC, including Prosser and Lubana, to countermand and undermine this Bankruptcy Court's lawful directives threaten serious injury to this Bankruptcy Court's jurisdiction and administration of these Cases as well as the Involuntary Case. Valuable information as well as various assets may be intentionally or inadvertently lost, deleted, absconded with, or even destroyed.

38. Accordingly, this Bankruptcy Court should exercise its inherent authority to compel the Hearing Examiner to show cause why this Bankruptcy Court should not impose civil contempt sanctions against him unless and until he revokes both the Order to Show Cause (to the

extent it seeks to direct or prohibit any action of the Trustee or the officers and directors of New ICC and/or its subsidiaries beyond presenting evidence and testimony in connection with a lawful and properly conducted investigation) and the September 11 Order.

MEMORANDUM OF LAW

I. STANDARD FOR CONTEMPT OF COURT

“A court has the ‘inherent power to enforce compliance with [its] lawful orders through civil contempt.’ *See Carty v. DeJongh*, 2007 WL 817607, *19 (D. V.I., Feb. 27, 2007) (quoting *Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990)). In order to hold a party in contempt, a court must find by clear and convincing evidence that: (i) a valid, specific and definite order exists; (ii) the party had knowledge of the order; and (iii) the party disobeyed the order. *See id.* “Willfulness is not an element of civil contempt, and good faith is not a defense.” *Id.* A party “may escape contempt by showing that [it] could not possibly have complied with the court’s order, despite making all reasonable efforts to do so.” *See id.* at *20 (quoting *Harris v. City of Philadelphia*, 47 F.3d 1333, 1341 (3d Cir. 1995)). Only “literal physical impossibility” allows a party to escape contempt notwithstanding disobedience of a court order. *See id.*

II. APPLICATION TO THE INSTANT CASE

A. Moorhead’s Lack of Authority

Title 30 provides the sole statutory authority for the PSC to administer public utilities (and only public utilities) doing business within the USVI.³ *See* 30 V.I.C. § 2. The PSC is empowered to require public utilities to comply with the provisions of that statute and related ordinances and regulations, but only “after hearing and notice by order in writing.” *See*

³ Query – does the PSC have any authority with respect to either New ICC or the Trustee, neither of which is a public utility in the USVI?

30 V.I.C. § 4. Thus, the PSC may not take action against a public utility absent a prior hearing that enables the utility to plead its case. No such hearing was held prior to Moorhead’s issuance of the Moorhead Orders, rendering any ruling or relief ordered therein void for noncompliance with Title 30.

Moorhead, ordered what is effectively *ex parte* injunctive relief in the Moorhead Orders.⁴ Hearing examiners are expressly prohibited by Title 30 from ordering this type of relief. 30 V.I.C. § 18 authorizes the PSC to appoint an “agent” such as a hearing examiner “for the purpose of making any investigation with regard to any public utility . . . whose [the agent’s] duties shall be prescribed in such order.” A review of the order appointing Moorhead as the Hearing Examiner (PSC Order 14/2007) only provides Moorhead with authority to serve as the PSC’s representative before this Bankruptcy Court in pending litigation involving entities owned and/or controlled by Prosser. Nowhere is Moorhead authorized by the PSC to enter orders, especially orders providing injunctive relief of the nature contained in the Moorhead Orders.

And for good reason, since § 18 expressly provides that an agent appointed by the PSC shall not have “. . . the power to issue any order for which a hearing is required” This is significant in two respects: (i) as noted, the PSC is required by statute to conduct a hearing before taking any enforcement action against a regulated public utility (*see* 30 V.I.C. § 4.), confirming that the Hearing Examiner lacks authority to exercise any enforcement rights⁵; and

⁴ The Show Cause Order directed the Trustee, “. . . not to exercise any control over the management and operations of the public utilities in the U.S. Virgin Islands. In addition, I [Moorhead] order the public utilities, and their direct and indirect affiliates, and all of their officers and directors, not to permit the trustee to manage or operate the utilities in any manner” (Show Cause Order at 6); and the September 11 Order – “. . . I [Moorhead] hereby order the parties not to effect or cooperate in any change in control of the Virgin Islands public utilities, as mandated in the Show Cause Order” (September 11 Order at 4).

⁵ Title 30 mandates a hearing as a prerequisite for enforcement actions and by statute hearing examiners cannot issue orders for which a hearing is required.

(ii) fundamental concepts of due process require evidentiary hearings as a condition precedent to the granting of injunctive relief.⁶ Undeniably, both Moorhead Orders grant injunctive relief. Both Orders therefore violate 30 V.I.C. § 18 and are void, *ab initio*.

Title 30 provides that Moorhead's role as the Hearing Examiner is expressly limited to conducting an investigation with regard to a public utility subject to the PSC's oversight. *See* 30 V.I.C. § 18. Section 18 further provides that hearing examiners are to make recommendations to the PSC following their investigations, which recommendations "... shall be advisory only" Thus, Moorhead is not empowered to make rulings or issue orders, only to conduct fact-gathering activities and make recommendations to the PSC, which must then conduct its own hearing before taking action.⁷

B. Moorhead's Disqualifying Conflict of Interest Renders the Moorhead Orders Void

Moorhead has a disqualifying conflict of interest because he was initially retained as private counsel for the PSC, in violation of Title 30 (see footnote 1, *infra*). As explained above, 30 V.I.C. § 18 grants the PSC authority to appoint hearing examiners to conduct investigations with regard to public utilities, which investigations must be conducted impartially and without bias. *See Virgin Islands Water and Power Auth. v. Public Services Commission*, 202 W.L.

⁶ The only exception is with respect to temporary restraining orders that may be issued *ex parte* in limited circumstances and whose duration is expressly limited by statute or rule. The Moorhead Orders are not so limited. (*See, for example*, the September 11 Order – “[t]his order is effective until, and unless, the Commission [PSC] acts to affirm or modify this Order in this docket.”) Moreover, Title 30 does not grant the PSC authority to issue temporary restraining orders and Moorhead is limited accordingly. *See* 30 V.I.C. § 18.

⁷ *See* 30 V.I.C. § 27, which expounds upon the powers granted to a hearing examiner (*e.g.*, the power to administer oaths, issue subpoenas, compel the attendance of witnesses, and the production of documents and testimony). Tellingly, disobedience of subpoenas and information requests issued by a hearing examiner can only be enforced upon application of a member of the PSC (not the hearing examiner) to the District Court. Further, 30 V.I.C. §§ 33 and 34, dealing with petitions for reconsideration and appeals, make clear that only the PSC (and, by implication, not a hearing examiner) can issue orders and make decisions regarding public utilities. Clearly, hearing examiners are not empowered to order *ex parte* injunctive relief, a form of enforcement action.

31309607, *5 (V.I.Ter. Sept. 24, 2002). The hearing examiner, as an appointee of the PSC, must be presumed to have substantial influence over the PSC's eventual findings and, therefore, must be more than an advocate for the PSC's position. *See id.* The hearing examiner must act as an impartial fact-finder and "should be devoid of any conflict of interest or potential conflict of interest with the public utility being investigated." *See id.*

Moorhead's blatant conflict of interest disqualifies him from serving as a hearing examiner in the Proceeding. Moorhead has repeatedly appeared before this Bankruptcy Court as the legal representative of, and an advocate for, the PSC on the change of control issues. Moorhead cannot possibly investigate the issues surrounding the appointment of the Trustee and the Trustee's conduct with respect to New ICC in an impartial and unbiased manner. Thus, Moorhead should be removed as Hearing Examiner (*see Virgin Islands Water and Power Authority*) and the Moorhead Orders declared null and void, *ab initio*, as a result of his tainted appointment.

C. Moorhead is in Contempt of this Bankruptcy Court

This Bankruptcy Court should order Moorhead, in his capacity as Hearing Examiner, to appear and show cause why he should not be held in contempt for violating the spirit and intent of the New ICC Order and attempting to interfere with its implementation under color of the PSC's authority, while knowingly acting in contravention of Virgin Islands law and with conflicted interests. Moorhead should be sanctioned until he ceases his continuing efforts to interfere with this Bankruptcy Court's jurisdiction and thwart its directives, specifically including the New ICC Order. The undisputed evidence clearly satisfies the standard for civil contempt.

There can be no dispute as to the satisfaction of the first two elements of the civil contempt standard. First, the New ICC Order exists and is valid, specific and definite. It is a binding order of this Bankruptcy Court that has not been stayed. Second, Moorhead had knowledge of the New ICC Order prior to entering the September 11 Order. Indeed, Moorhead, as counsel for the PSC, actively participated in the two-day hearing that resulted in the New ICC Order.

It is also beyond dispute that the final element of the standard for civil contempt - disobedience - has been satisfied. Moorhead disobeyed the clear commands of the New ICC Order by issuing the September 11 Order and instructing third parties, including New ICC employees, to disregard the New ICC Order. Remarkably, this action was taken by the Hearing Examiner despite his affirmation to the USVI Legislature last November that federal bankruptcy laws preempt territorial law. Notwithstanding the careful wording of the September 11 Order and its opening appeal to comity, the September 11 Order has as its sole purpose the emasculation of the New ICC Order. There is no other possible reason for the September 11 Order. Obviously, the entry of the New ICC Order (and/or Prosser) goaded Moorhead into action, prompting Moorhead's open and intentional interference with this Bankruptcy Court's administration of the Debtors and now New ICC.

Moorhead accomplished his goal of subverting the New ICC Order. Prosser inappropriately used the September 11 Order as an excuse to disregard the New ICC Order and eject the Trustee's professionals from New ICC's corporate offices. This Bankruptcy Court cannot condone this continuing violation of its jurisdiction and subversion of its directives. The Trustee has made every effort to work with Moorhead and the PSC to negotiate an acceptable protocol that would govern the relationship between the Trustee and the PSC. Moorhead,

however, clearly has no intention of abiding by this Bankruptcy Court's jurisdiction over the Debtors, and continues to interfere with the Trustee's efforts in order to assist Prosser and the officers of New ICC, a non-regulated entity, in their own obstructionary efforts. This Bankruptcy Court must impose contempt sanctions against Moorhead as Hearing Examiner until he removes the roadblocks he has erected to impede the Trustee.

The Trustee anticipates that Moorhead will argue he should not be held in contempt because he serves as a member or agent of the PSC, an arm of the government of the USVI. As demonstrated above, Moorhead's actions were taken without portfolio and are well beyond the limited authority granted him. Further, while the Eleventh Amendment to the United States Constitution bars unconsented suits against state agencies (*See Town of Springfield, Vermont v. McCarren*, 549 F.Supp. 1134, 1146 (D. Vt. 1982)), it is well established that a federal court has the power to restrain lawless conduct by government officials. *See id.* Thus, a district court may restrain individual state government officials from continuing to violate federal law. *See id.* at 1147. Moorhead continues to undermine this Bankruptcy Court's jurisdiction and violate this Bankruptcy Court's directives - which supremacy Moorhead himself admitted in his testimony before the Legislature in November 2006 - all the while acting in contravention of Title 30. This Bankruptcy Court must restrain Moorhead from continuing to obstruct this Bankruptcy Court's administration of the Debtors' estates as well as the administration and affairs of New ICC.

CONCLUSION

This Bankruptcy Court should order Moorhead, in his capacity as Hearing Examiner, to appear and show cause why he should not be held in civil contempt. This Bankruptcy Court should also consider the imposition of appropriate sanctions designed to compel Moorhead to cease interfering with this Bankruptcy Court's jurisdiction. This Bankruptcy Court should

further compel Moorhead to revoke both his Order to Show Cause (in relevant part) and his September 11 Order. The Trustee cannot fulfill his duties under the Appointment Order and the New ICC Order until Moorhead ceases abusing his limited powers as Hearing Examiner by interfering with the Trustee and this Bankruptcy Court and by aiding and abetting Prosser's obstructionary tactics.

WHEREFORE, the Trustee respectfully requests that this Bankruptcy Court enter an order directing Moorhead, in his capacity as Hearing Examiner, to appear and show cause why he should not be held in civil contempt and sanctioned, and granting such additional and further relief as this Bankruptcy Court deems just and proper.

Dated: September 19, 2007

Respectfully submitted,

VINSON & ELKINS LLP
Trammell Crow Building
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201
214.220.7700 (main)
214.220.7716 (fax)]

By: /s/ James J. Lee

Daniel C. Stewart, SBT # 19206500

James J. Lee, SBT # 12074550

Paul E. Heath, SBT # 09355050

Michaela C. Crocker, SBT # 24031985

**CONFLICTS COUNSEL AND SPECIAL
COUNSEL TO THE CHAPTER 11
TRUSTEE**

- AND -

Benjamin A. Currence, Esq.
**LAW OFFICES OF BENJAMIN A.
CURRENCE**

Local Counsel for the Trustee

5045 Norre Gade, Ste. 2

P.O. Box 6143

St. Thomas, VI 00804-6143

Tel: (340) 775-3434

Fax: (340) 774-1001

**ATTORNEYS FOR STAN SPRINGEL,
CHAPTER 11 TRUSTEE FOR
INNOVATIVE COMMUNICATION
COMPANY, LLC AND EMERGING
COMMUNICATIONS, INC.**